LE COPY

Supreme Court, U.S.
FILED
OCT 26 1972
MICHAEL RODAK, JR., CLERK

No. 71-1573

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

ARCHIE PELTZMAN, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

Archie Peltzman
8725 16th Avenue
Brooklyn, N.Y. 11214
Petitioner Pro Se

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 71-1573

ARCHIE PELTZMAN, Petitioner

v

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its order of October 10, 1972 denying the petition for writ of certiorari, that a writ of certiorari issue to review the judgement of the Court Of Appeals for the Second Circuit in the above-entitled case.

Grounds For Rehearing

Petitioner wishes to argue the following substantial grounds available to him although not previously presented.

1. Petitioner argues that the Court in Goldberg v Kelly; 397 US 254, (1970) held that welfare receipient must be afforded a hearing to determine the validity of the public assistance's agency to determine benefits before actual termination occurs. Court declared following elements essential - an opportunity for the receipient to be heard in person to present oral evidence and to cross-examine adverse witnesses, the assistance of counsel in preparing for the hearing, and a statement by the official setting forth the reasons for and evidence in support of his decision to terminate the receipient's benefits.

(a) Petitioner argues that no hearing was held in his case, before

General Counsel for N.L.R.B. dismissed the complaint against the union and the employer, after both had caused petitioner to be denied reemployment to his job, after taking a vacation from the vessel upon which he had been continuously employed for nine months. (App. p. 11),I3a,)

2. The Court held in Association of Data Processing Serv. Orgs. v Comp. 397 U.S. 159 (1970) Quote "There is no presumption against judicial review and in favor of administrative absolutism".

3. Justice Brandeis' concurring opinion in St. Joseph Stockyards v United States 298 US 38,84 (1936) that "The supremacy of Law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied"..

4. In Tooahnippah v Hickel 397 US 598 (1970) reversing and remanding sub nom. High Horse v Tate 407 F 2^{d} 394 (10th Cir 1969) - Court concluded that Secretary of Interiors decision was subject to judicial review. It says that

aggrieved persons may obtain review of administrative decisions. (App.p.14-17)

5. In City of Chicago v United States 396 U.S. 162 (1970) the question was whether orders of the I.C.C. which discontinued investigations respecting notice to railroads to terminate or change the operation of interstate passengers was judicially reviewable. The lower Court had held that decisions terminating investigations were not "orders" within the statue providing for review of I.C.C. orders. The Supreme Court reversed, asserting that the decision below virtually revived the "negative order" doctrine repudiated a generation ago in the Rochester Telephone Case 307 US 125 (1939)

(a) Petitioner argues that the refusal to issue a complaint by General Counsel of N.L.R.B. is in reality a "negative order", and in any event Justice Brandeis' classic statement in St. Josephs Stockyards v United States

(supra) should be observed.

5. Petitioner wishes to argue from Justice Story's Commentaries on The Constitution Of The United States (1970 Da Capo Press edition). Volume 111 Chapter XLV-Powers of Congress - Incidental.

Sec 1231 - The next power of Congress is "to make all laws, which shall be necessary and proper for carrying into execution the foregoing power, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof".

.....Whenever, therefore a question arises concerning the Constitutionality of a particular power, the first question is, whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power, and necessary to its execution.

If it be, then it mey be exercised by Congress. If not, Congress cannot exercise it.

(a) Petitioner argues that since due process and the protection of property rights, and equal treatment before the law is expressly written into the Constitution by the 5th, 9th, and 14th Amendments, Congress cannot proscribe those rights.

6. Petitioner wishes to include in the appendix attached hereto citations and excerpts from Professor Jaffe's thesis on Judicial Review published in various volumes of Harvard Law Review.

Conclusion

For the reasons set forth above and in the petition for writ of certiorari, and Reply Brief, it is respectfully urged that rehearing be granted and that; upon such rehearing, a writ of certiorari be granted and that upon

such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

Archie Peltzman

Archie Peltzman
Petitioner Pro Se

Certificate Of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Archie Peltzman
Archie Peltzman
Petitioner Pro Se

Oct. 24, 1972

APPENDIX

From Volume 70 Harvard Law Review April 1957 Judicial Review: Constitutional and Jurisdictional Fact.

1. On p 970 - Discussion of Crowell v Benson 285 US at 54-55, 56, 57. Also see John Dickinson, Crowell v Benson - Judicial Review of Administrative Determinations of "Constitutional Fact" 80 U. Pa. L. Rev. 1055, 1077-82, (1932) See Also Davis - Unreviewable Administrative Action, 15 F.R.D. 411, 426, (1954)

On p 965 - Discussion of People ex rel Cook v Board of Police 39 N.Y. 506 (1868). Professor Jaffe says Judge Woodruff, writing for the New York Court Of Appeals, boldly swept aside the language of jurisdictional fact and held that certiorari reaches all questions of law whether of liability or procedure...

2. From Volume 71 - Harvard Law Review January (1958), on p 804, Professor Jaffe discusses possibility of judicial power without authority to question validty of a statute or administrative order.

3. From Volume 71 March 1958 Harvard Law Review, on p 800, Professor Jaffe cites Mr. Justice Jackson concurring in Youngstown Sheet & Tube Co v Sawyer 343 US 579, 646 (1952); Referring to the power of the president to execute the law and to the fifth amendment, he said

One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no further. These signfy about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.

On p 790, Professor Jaffe says that though review of the merits may be excluded, a Court may entertain a claim that a statutory procedual right has been denied (citing Robertson v Chambers 341 US 37 (1951).....

The Court of Appeals nevertheless upheld a claim that a statutory procedual right had been violated, a decision which the Supreme Court reversed on the merits.

On p 793, Prof. Jaffe discusses the power of the N.L.R.B. to initiate a complaint and argues that the presence of discretion should not bar a court from considering a claim of illegal or arbitrary use of discretion. See p 774-78 infra.

4. From Harvard Law Review Volume 69 (1955) p 274, Prof. Jaffe says, An agency is not an island entire of itself. It is one of the many rooms in the magnificient mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the "Common law" and the ultimate guarantees associated with the Constitution. (emphasis added).